IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. **78-434**

ROLAND C. HANSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[redacted]

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Petitioner's Brief

Roland C. Hansen, the petitioner, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is printed in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the petitioner was denied his Fifth Amendment right against self-incrimination when he was forced to object in the presence of the jury to his being called as a witness by his co-defendant.

2. Whether the petitioner was denied his Sixth Amendment confrontation right when he was prohibited from using leading questions in his examination of his co-defendant whose out-of-court statements, admitted under the co-conspirator exception to the hearsay rule, inculpated him.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On August 24, 1976, Roland C. Hansen and four other individuals were indicted by the Federal Grand Jury and charged with violations of 18 U.S.C. 1962 (the Racketeer Influenced and Corrupt Organizations statute) and of 18 U.S.C. 1341 (mail fraud). The indictment charged that those indicted conspired for the prupose of defrauding certain insurance companies by the use of mails and committed various acts of arson on certain described properties located in the County of Milwaukee, Wisconsin.

Roland C. Hansen, the petitioner, and Steven R. Hansen ("co-defendant") are father and son, respectively. Counsel for petitioner is Donald S. Eisenberg, of Madison, Wisconsin. Trial counsel for Steven R. Hansen was Alan Eisenberg of Milwaukee, Wisconsin. (Counsel are not related.)

On January 3, 1977, the three others indicted with the Hansens pleaded guilty and were later sentenced. On that same day, January 3, 1977, the joint trial of Roland C. Hansen and Steven R. Hansen commenced. Prior to the commencement of the trial and on numerous occasions during the trial, Roland C. Hansen moved for severance. All such motions were denied.

During the trial, a tape recording of conversations between one Howard Bloom, an unindicted co-conspirator, and Steven Hansen was admitted into evidence. Simultaneously, an excerpted transcript of that

recording was provided the jury for their use in listening to the tape. During that conversation, numerous references to Roland C. Hansen are made by both Howard Bloom and Steven Hansen. The government made extended use of these references in its case against the petitioner.

During the presentation of his case, Steven Hansen, the co-defendant, called the petitioner as a witness in the presence of the jury. The petitioner objected. (See Circuit Judge Wood's opinion, United States Court of Appeals for the Seventh Circuit, App., *infra*, pp. 8-9, footnote 5.)

Steven Hansen testified in his own defense. In his examination of Steven Hansen, counsel for the petitioner was expressly limited by the court to a direct examination, and the government's repeated objections to what it considered leading questions during that examination were sustained. Two illustrations of the restrictions placed upon this examination follow:

> Examination of Steven Hansen, co-defendant, by Donald S. Eisenberg, petitioner's attorney. Objections by Thomas E. Martin, Assistant United States Attorney.
>
> (1) R., Vol. XV, pp. 2443-44.
>
> BY MR. DONALD EISENBERG:
>
> Q. Mr. Hansen, at any time in your conversations with Howard Bloom, did you ever tell him that your father was responsible in any manner, shape or form for any fires?

MR. MARTIN: Object: Leading.

COURT: Sustained. I am not satisfied you are entitled to cross-examine this witness, Mr. Donald Eisenberg. You have to ask direct questions.

MR. DONALD EISENBERG: Your Honor, for the record again, my previous objections, one was severance, and the other I would raise again, and I still believe that this is an adverse witness. He is not my client, he is a different defendant, and I object to the Court's ruling.

MR. Donald Eisenberg:

Q. State whether or not you ever told Howard Bloom that your father was responsible in any manner, shape or form for the start of any fires?

MR. MARTIN: Same objection.

COURT: Same ruling. It's clearly leading.

MR. DONALD EISENBERG:

COURT: Same ruling.

MR. DONALD EISENBERG:

Q. Can you recall any conversations with Howard Bloom, that Howard Bloom taped, wherein you ever involved your father in any of these fires?

MR. MARTIN: Objection: leading.

COURT: Sustained.

(2) R. Vol. XV, p. 2446

Q. Did you at —— during this period of time owe Howard Bloom money?

A. Yes, I owed him on a land contract.

Q: During any of these periods of time, did you pay directly to your father money that you owed to Bloom because Bloom also owed your father money?

MR. MARTIN: Object: leading.

COURT: It's thoroughly leading, Mr. Eisenberg, and I will have to sustain the objection.

MR. DONALD EISENBERG:

Q. Did you, at any time during this period of time, owe your father money?

A. Yes, I believe I did.

Q. At any time during this period, were you ever given any credits by Howard Bloom for moneys that you paid to your father?

MR. MARTIN: Object: leading

COURT: Sustained.

MR. DONALD EISENBERG: Your Honor, again, these are all matters that I didn't bring forth, and I think it's unfair that I am not allowed to cross-examine this witness.

COURT: I will persist in my ruling, Counsel.

On February 14, 1977, the jury returned verdicts of guilty against both defendants. Sentences were pronounced on April 8, 1977. Roland C. Hansen received a sentence of seven (7) years imprisonment as to each of two counts, to be served concurrently, and five (5) years imprisonment as to each of the remaining ten counts, to be served concurrently with each other and concurrently with the sentences imposed as to the first two counts, for a total commitment of seven (7) years.

The basis for jurisdiction for the United States District Court was 18 U.S.C. § 3231. The basis for jurisdiction for the United States Court of Appeals for the Seventh Circuit was 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

1. The decision of the Seventh Circuit Court of Appeals in this case conflicts with the decision of the Fifth Circuit Court of Appeals on the same issue in *De Luna v. United States*, 308 F.2d 140, reh.den. 324 F.2d 375 (1963). *De Luna* held that when one of two defendants jointly tried in a criminal proceeding in a federal court exercises his right not to testify, the Fifth Amendment protects him from prejudicial comments on his silence made to the jury by an attorney for the co-defendent. (308 F.2d at 141.) The instant case differs from *De Luna*, *supra*, in that the behavior objected to here is a co-defendant forcing the petitioner in the presence of the jury to refuse to take the stand, rather than, as in *De Luna, supra*, a co-defendant commenting in final argument on the defendant's failure to testify. But in denying the government's petition for a rehearing in *De*

Luna, the Fifth Circuit Court of Appeals stated that "... in criminal trials a fair interpretation of the Constitution prohibits *all* reference to an accused's failure to testify." *(De Luna*, 324 F. 2d 375, 376; emphasis by the court.) Obviously, that the prejudicial comment was made during final argument was not crucial to the *De Luna* court. Had the comment been made in some other way or at some other time during the trial, the same issue would have been presented, namely, whether a co-defendent can comment on a denfendant's failure to testify. Calling a defendant as a witness presents this same issue. Instead of alluding to or commenting on the failure to testify, the co-defendant in the instant case forcefully *demonstrated* to the jury that the petitioner would not take the stand in his own defense. What makes the respective conduct of the co-defendants in *De Luna, supra*, and in the instant case objectionable is that the Fifth Amendment right against self-incrimination of the respective defendants was violated. The Fifth Circuit has decided that such violations are not permissible; the Seventh Circuit in the instant case has decided that since "(t)he trial was a series of objections about one thing or another,. . . no special significance could be attached to [the defendant's objection to being called as a witness]" (App., *infra*, p.10).

The petitioner urges that a writ of certiorari be issued so that this conflict may be resolved.

2. This case also presents an important question of federal criminal law which has not been, but should be, settled by this Court. Out-of-court statements made by a co-defendant, which statements inculpated the de-

fendant and upon which much of the government's case rested, were admitted into evidence against the defendant under the co-conspirator exception to the hearsay rule. The co-defendant testified in his own defense, but the defendant was prohibited from asking leading questions in his examination of the co-defendant.

Recent decisions by this Court have emphasized the importance of cross-examination of out-of-court declarants. A question not yet decided is whether the Confrontation Clause of the Sixth Amendment is violated when a defendant is so severly restricted in his mode of questioning of a co-defendant whose out-of-court statements play a principal role in the prosecution.

In *Bruton v. United States,* 391 U.S. 123, 126, 88 S. Ct. 1620, 1622, 20 L. Ed. 2d 476, 479 (1968), the right to confront and cross examine those who have made out-of-court declarations inculpating an accused was deemed by this Court to preclude the admission of a co-defendant's confession at a joint trial. In *Bruton, supra,* the co-defendant whose admissions inculpated the appellant did not testify at trial and the appellant had no opportunity to conduct any examination of the co-defendant. While the petitioner in the instant case did have an opportunity to examine the co-defendant through use of non-leading questions, the Sixth Amendment guarantee of the opportunity to cross-examine makes this distinction between *Bruton* and the instant case inconsequential.

> "The Constitution . . . is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective" cross-examination." (*Nelson v. O'Neil,* 402 U.S. 622, 627, 91 S. Ct. 1723, 1726, 29 L.Ed.2d 222, 227 (1971); opinion and emphasis by Mr. Justice Stewart.)

In *Dutton v. Evans,* 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed. 2d 213 (1970), this Court ruled that the admission of a statement of a co-conspirator under Georgia's co-conspirator exception to the hearsay rule did not deny appellant his Sixth Amendment right to confrontation where the co-conspirator did not testify and, thus, was not subject to cross-examination.

The following excerpts from the four-man plurality opinion make clear, however, that the basis of the decision was the relative insignificance and reliability of the out-of-court statement:

> "In the trial of this case no less than 20 witnesses appeared and testified for the prosecution. [The appellant's] counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eyewitness who described all the details of the triple murder and who was cross-examined at great length. Of the 19other witnesses, the testimony of but a single one is at issue here. That one witness testified to a brief conversation about [the appellant] he had with a fellow prisoner.... The witness was vigorously and effectively cross-examined by defense counsel. His testimony, which was of *peripheral significance at most,* was admitted in evidence under a co-conspirator exception to the hearsay rule long

established under [Georgia] statutory law . . ., *Dutton v. Evans*, 400 U.S. at 87, 91 S. Ct. at 219, 27 L. Ed. 2d at 226.

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the *accuracy* of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory *basis for evaluating the truth* of the prior statement.' *California v. Greene*, 399 U.S. at 161, 26 L. Ed. 2d at 499. [The appellant] exercised effectively, his right to confrontation on the factual question whether [the hearer of the-of-court statement] had actually heard [appellant's co-conspirator] make the statement . . . . And the possibility that cross-examination of [appellant's co-conspirator] could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal." (*Id.*, 400 U.S. at 89, 91 S. Ct. at 220, 27 L. Ed. 2d at 227; emphasis added).

In the instant case, the out-of-court statements made by the co-defendant were crucial to the prosecution's case and were made under circumstances which interject considerable doubt about their reliability.

The opinion of the Court of Appeals for the Seventh Circuit, written by Circuit Judge Wood, concentrates upon the exculpatory nature of the testimony given by the co-defendant at trial (App. *infra*, p. 8). What that opionion ignores is that leading questions are necessary in a case like this to insure that "the trier of fact [has] a satisfactory basis for evaluating the truth"

(*Dutton v. Evans*, 400 U.S. 74 at 87) of the out-of-court declarations. When the witness is a co-defendant, facing possible imprisonment, he may need the prodding of leading questions by defendant's counsel to reconstruct the context in which the statements damaging to the defendant were made; without the freedom to fully examine the co-defendant witness, the basis for evaluating the truth provided the trier of fact cannot be "satisfactory". A balancing of the *slight* cost of allowing the defendant in such a case to use leading questions against the heavy emphasis placed by the government on the out-of-court declarations dictates that a defendant be allowed to cross examine vigorously. The defendant in such a case is the only party interested in attacking the witness' credibility.

Since this issue arises frequently in conspiracy prosecutions and has not been decided by this Court, issuance of a writ of prohibition is in the public interest.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari be granted.

DONALD S. EISENBERG
Counsel for Petitioner

SEPTEMBER 1978

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 77-1424, 77-1425

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROLAND C. HANSEN and STEVEN R. HANSEN,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 76 CR 129—**Myron L. Gordon**, *Judge.*

ARGUED APRIL 3, 1978—DECIDED AUGUST 15, 1978

Before CUMMINGS, SPRECHER and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* We consider in these consolidated appeals the jury trial convictions of Roland C. Hansen and Steven R. Hansen, father and son, who were charged along with three others not involved in this appeal, with a sizeable arson-insurance enterprise.[1] The

[1] Roland C. Hansen, the father, was convicted of conspiracy and substantive racketeering charges, Counts 1 and 2, and mail fraud, Counts 4, 5, 7, 8, 9, 13, 14, 15, 16 and 20, and was sentenced to seven years imprisonment on Counts 1 and 2, and concurrently to five years on each of the mail fraud counts, for a total commitment of seven years.

(Footnote continued on following page)

indictment may be characterized as alleging that the five defendants, along with an unindicted co-conspirator, Howard Bloom, and others were engaged in an enterprise whereby they sold properties among themselves, insured those properties at inflated rates, caused them to be burned, and then collected or attempted to collect the insurance proceeds.

There is no need to review in detail the evidence of the particular fires occurring on the eight different properties in Milwaukee, Wisconsin. Numerous employees of insurance agencies and companies testified relative to the processing of insurance applications, proof of loss, the issuance of drafts involving the eight properties, and the items which were sent through the mails in the normal course of business. The insurance witnesses also identified insurance documents which reflected the financial interest of the five defendants in the eight properties in question. There was evidence concerning the ownership of the eight properties. The supervisor of the records of the building inspectors for Milwaukee identified the records kept relative to the eight properties which reflected the notice of violations which had been given to the defendants. The foreman of the grand jury which heard the allegedly perjurious testimony of Steven R. Hansen also testified. The critical testimony

[1] *continued*

Steven R. Hansen, the son, was convicted of the conspiracy and substantive racketeering charges, Counts 1 and 2, mail fraud, Counts 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19 and 20, and of giving false testimony before the grand jury, Counts 24 and 25, and sentenced to a term of fourteen years imprisonment on Counts 1 and 2 to be served concurrently with terms of imprisonment of five years on each of the mail fraud and perjury counts, for a total commitment of 14 years.

Codefendant William Zoesch pled guilty to mail fraud, Count 12, and was sentenced to four years imprisonment. Codefendant Chris Caras pled guilty to conspiracy to conduct a racketeering activity, Count 1, and mail fraud, Count 3, and was sentenced to two years imprisonment on each of Counts 1 and 13, to be served concurrently. Codefendant Robert Anton pled guilty to conspiracy to conduct a racketeering activity, Count 1, and was sentenced to two years imprisonment.

was that of Bloom and the codefendants. Bloom, the unindicted co-conspirator, testified about his own involvement in the arson-for-profit activities and the involvement of his codefendants. Bloom also authenticated a tape, monitored with his consent by the Federal Bureau of Investigation, of his conversations with Steven R. Hansen and Roland C. Hansen. The three other co-conspirators testified relative to their own involvement and the involvement of the two Hansens.

It is not disputed that the fires were the result of arson. The defenses appear to be based primarily on the alleged lack of credibility of the government's witnesses. The attorney for Steven R. Hansen argued to the jury that the government had rounded up "five liars and thugs to gang up on Steven Hansen," and that there was an effort aided by the government to frame the Hansens. The jury, and not without reason, chose to believe the government's witnesses, some of whom the government admitted "would not qualify as Eagle Scouts." At least the parties seem to agree that the defendants were not very discriminating in their choice of friends and associates. The evidence, however, is more than sufficient to assure that both defendants were guilty beyond a reasonable doubt of all charges, except with regard to the perjury counts against Steven R. Hansen. The issues raised by each defendant are individual and will be considered separately.

Roland C. Hansen argues that there was reversible error in the denials of his various motions for severance denying him a fair trial exemplified primarily by the trial judge's refusal to permit cross-examination of Steven R. Hansen by Roland C. Hansen in violation of the Sixth Amendment; by the calling by Steven R. Hansen of Roland C. Hansen as a witness requiring Roland C. Hansen to object in front of the jury. It is also claimed that in final argument the government made prejudicial references to Roland C. Hansen's failure to testify.

Steven R. Hansen raises various issues alleging: (1) that his Sixth Amendment rights were violated by restrictions imposed on his direct and cross-examination of witnesses; (2) that the trial judge erred in admitting

the testimony and certain official records of the supervisor of the Building Inspection and Maintenance Division of the city of Milwaukee; (3) that the court erred in permitting the government to call as a witness the foreman of the grand jury which had indicted the defendants; (4) that the perjury evidence was insufficient; (5) that the trial judge was not impartial; and (6) that the sentence was based on improper considerations and was excessive.

I.

Roland C. Hansen's Issues

Roland C. Hansen moved unsuccessfully before trial and during trial for severance. He argues that by reason of the denials of those motions he was not permitted to cross-examine Steven R. Hansen after Steven R. Hansen testified in his own behalf, and secondly that it resulted in Roland C. Hansen being called as a witness by Steven R. Hansen necessitating his objection before the jury to his prejudice. Roland C. Hansen did not testify during the trial.

The difficulty first arose when counsel for Roland C. Hansen endeavored to cross-examine Steven R. Hansen with questions which were viewed by the court as leading. The use of leading questions is controlled by Rule 611(c), Federal Rules of Evidence.[2] Roland C. Hansen claimed that Steven R. Hansen was an adverse witness entitling him to the right to cross-examine. However, Roland C. Hansen was fully permitted to examine Steven R. Hansen by the use of questions not considered to be leading. What evidence may have been foreclosed by the restrictions on the form of the questions is not suggested. Our examination of the

[2] Rule 611(c) provides:

> (c) Leading Questions.—Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

record strongly suggests that although the father and son were not adverse to each other, their counsel may have been. Not only did Steven R. Hansen not implicate Roland C. Hansen by any response, he consistently endeavored to totally exonerate his father.[3]

[3] For example, during direct examination these questions were asked and these answers given by Steven R. Hansen:

> Q. Now, he testified here in this courtroom that he was present during hundreds of conversations that your father was also present at where the three of you discussed arsons. What is your knowledge of the truth about that?
>
> A. My father was never present at any such conversations involving arson. It wouldn't—it was not simply—it wouldn't be permitted. He never brought me up that way, and totally ridiculous that these persons are saying that he was aware of any of these buildings that were burned by their ownselves. I can not even believe it to this day that they would come in here and make admissions against my father who has been in business for over twenty years and successful and never even had one fire on any of his properties. I don't think that they should be permitted to even make such accusations as they did.
>
> * * * * *
>
> Q. Did you—after the indictment came down, did you ever have occasion to discuss with Anton him telling the truth?
>
> A. I have asked and told Robert Anton more than twenty times to come in here and say the truth and clear me and my father from this, and he stated that he was going to do so. When it came to the day before the trial, he was here and he did not do that.

During examination of Steven R. Hansen by counsel for Roland C. Hansen, these questions were asked and these answers given:

> Q. Why did Howard Bloom tell you that he had to frame you and your father?
>
> A. Because he said that it wasn't enough for the Government to have Anton answer to other men in this trial, that they wanted a conspiracy to look like from the start to the end as to who was involved in this, and he even stated that he knew I wasn't involved, or my father wasn't involved in this.
>
> Q. Was your father ever present at any meetings with Anton or anyone else wherein arson was discussed?
>
> A. Never.
>
> * * * * *

(Footnote continued on following page)

Roland C. Hansen more specifically bases his objection upon statements incriminating to him which had been made by Steven R. Hansen to Bloom, the unindicted co-conspirator who testified under a grant of immunity. Some of those statements were taped by Bloom and the F.B.I. prior to indictment without the knowledge of Steven R. Hansen. Counsel for Roland C. Hansen attempts to develop a *Bruton*[4] error out of this circumstance because in his examination of Steven R. Hansen he was not permitted to "cross-examine." Counsel for Roland C. Hansen fairly points to some distinctions in his argument relying on *Bruton* and in certain other cases. In *Bruton*, a joint trial in which the confession of a non-testifying codefendant which implicated Bruton was admitted into evidence, it was held that an instruction to the jury limiting the confession to the codefendant was not sufficient. Roland C. Hansen also cites *United States v. Holt*, 483 F.2d 76 (5th Cir. 1973), another father and son trial, but in that case the damaging statements had been made by the father to the F.B.I. about the son's involvement. The father did not

[3] *continued*

Q. Did your father ever take that furnace?
A. No.
Q. At any time in 1974 to the present, was your father involved in any manner with any of your friends or your peers of your age, except to say "Hello"?
Mr. Martin: Object: leading.
Court: Sustained.
Mr. Donald Eisenberg:
Q. Did your father have any business dealings whatsoever with any of your friends in the 18 to 22 year age category?
A. No, he never did.
Q. In your conversation with Howard Bloom that was taped by Mr. Bloom, did you at any time admit that your father had any knowledge of any conspiracies to defraud anyone?
A. He never did so I could see it.
Q. Did you ever admit that your father was involved in any insurance fraud schemes?
A. No.
Mr. Donald Eisenberg: I have no further questions.

[4] *Bruton v. United States*, 391 U.S. 123 (1968).

testify in an effort to explain away the damaging statements because he could have been impeached by his prior criminal record. The conviction was reversed on *Bruton* grounds. Roland C. Hansen concedes that these cases may be distinguished as in neither *Bruton* nor *Holt* did the codefendant testify, but argues that the distinction is inconsequential relying in part on *Nelson v. O'Neil*, 402 U.S. 622 (1971). In that case, which has some similarities to the present case, the court concluded that the Sixth Amendment had not been violated "where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts." *Id.* at 629. The point that was unsuccessfully urged on the Court was that there could be no full and effective cross-examination when the codefendant denied making the inculpatory statement. In that case the defendant had nothing to gain by cross-examination. Again counsel brings to our attention the distinction that the damaging admissions in *Nelson* were not admissible under the co-conspirator exception to the hearsay rule. Under Rule 801(d)(2)(E) of the Federal Rules of Evidence "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not considered hearsay. In *Bruton*, 391 U.S. at 128, n.3, that Court noted that the inculpatory statement did not come within a recognized exception to the hearsay rule. No issue is raised on appeal that the inculpatory statements of Steven R. Hansen were not properly admitted under Rule 801. To attempt to overcome that distinction, Roland C. Hansen next refers us to *Dutton v. Evans*, 400 U.S. 74 (1970). He concedes that in that habeas corpus case the court ruled that the admission of a statement of a co-conspirator under Georgia's co-conspirator exception, a broader exception than is recognized in federal conspiracy trials, did not deny appellant his Sixth Amendment right to confrontation where the co-conspirator did not testify and was thus not subject to cross-examination. Roland C. Hansen argues that *Dutton*, however, turned on the fact that the admitted hearsay was not "crucial" or "devastating," 400 U.S. at 87, in contrast to the present case in which it is claimed

Steven R. Hansen's testimony was crucial to the government's case. Even if we grant Steven R. Hansen's taped conversation to be critical evidence in the conviction of Roland C. Hansen, we do not read *Dutton* as requiring reversal. In the present case it must be remembered that Steven R. Hansen did testify, tried to explain away all his admissions and to help his father during direct examination, during his examination by counsel for Roland C. Hansen and during cross-examination by the government. Also a more limited hearsay exception is here involved than in *Dutton*. No objection is raised on appeal to the given conspiracy instruction.

Nor does *Brown v. United States*, 56 F.2d 997 (9th Cir. 1932), aid Roland C. Hansen. In that case a defendant testified in his own behalf but in doing so incriminated his codefendant. It was held that the defendant, not just the government, had the right to cross-examine his testifying codefendant. The situation in the present case may be distinguished as Steven R. Hansen did not incriminate Roland C. Hansen during his testimony.

Rule 611(c) uses the term "ordinarily" when providing that leading questions should be permitted on cross-examination. That qualification we are told by the Advisory Committee on Proposed Rules was "to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact. . . ." See 10 MOORE'S FEDERAL PRACTICE, § 611.31. That appears to cover the present case. The weight to be accorded the statements, taped or untaped, of Steven R. Hansen was for the jury. We find no prejudice to defendant Roland C. Hansen.

As a part of the severance issue, Roland C. Hansen next objects to the fact that Steven R. Hansen during the presentation of his defense called Roland C. Hansen as a witness causing Roland C. Hansen to object in the presence of the jury.[5] That what happened can easily be

[5] Immediately prior to this event the following dialogue took place between the attorney for Steven R. Hansen and the court:

> Mr. Alan Eisenberg: Your Honor, I have a witness to call first, and that I believe should be done out of the

(Footnote continued on following page)

recognized as an error of potentially fatal consequences does not dispose of the issue in the circumstances of this case. Roland C. Hansen relies principally upon *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965), in which this court commented that it would be prejudicial error for a defendant to call a codefendant as a witness against his wishes and force the codefendant to decline to testify in front of the jury. That, however, was not the holding in that case. Echeles, on trial with a codefendant, had moved for a severance on the ground, among others, that since it was anticipated that his co-

[5] *continued*

> presence of the jury, as to the calling of that witness. Request permission to do that now.
>
> Court: Well, I decline that request. Call the jurors in. If there is need for an adjournment, I will grant it.
>
> Mr. Alan Eisenberg: I don't think I should even say it in the presence of the jury.
>
> (Jury returned to the courtroom at 1:47 o'clock P.M., and the following proceedings were had.)
>
> Court: You have a witness to call at this time?
>
> Mr. Alan Eisenberg: Defendant Steven Hansen calls Roland C. Hansen as his witness.
>
> Mr. Donald Eisenberg: Your Honor, I object.
>
> Court: We will entertain the objection to that in the absence of the jury. Will the jurors please return to the jury room?

After the objection of Roland C. Hansen and motions for mistrial or severance were overruled, the jury returned and was instructed as follows:

> Court: Members of the jury, in a trial involving two defendants, one defendant may not call the other defendant as a witness and, therefore, the Court has not only sustained Mr. Donald Eisenberg's objection to having Mr. Roland Hansen called as a witness but I have admonished Mr. Alan Eisenberg that his effort to do so was improper.
>
> You ladies and gentlemen must wholly disregard the effort of the counsel for Mr. Steven Hansen to have proposed calling the co-defendant, Roland Hansen, to the witness stand. That was an improper act. The Court could not permit it over objection, and Mr. Roland Hansen, through his counsel, did object. I have sustained that objection, and neither party could, even if he chose to, call the other party as a witness.
>
> Will you please proceed, if you have other witnesses.

defendant was not going to testify and Echeles would not be permitted to call him as his witness, Echeles would be deprived of the favorable testimony of his co-defendant holding Echeles blameless. Echeles was not to be required to actually call his codefendant to prove that his codefendant would refuse to testify. This court directed severance. In the present case, however, the issue on appeal is not that either Roland C. Hansen or Steven R. Hansen would be deprived of the exculpatory testimony of the other.

Two other cases are helpful. In *Coleman v. United States*, 420 F.2d 616 (D.C. Cir. 1969), the trial court permitted a codefendant to call each of his three codefendants as witnesses before the jury, knowing in advance that each would decline to testify. Counsel for the defendant also was permitted in closing argument to refer to his unsuccessful attempt to call his codefendants. Since it was not considered to be a close case on the question of guilt, it was held to be harmless error beyond a reasonable doubt. In *United States v. Barney*, 371 F.2d 166 (7th Cir. 1966), this court considered a similar problem. A defendant attempted twice in front of the jury to call his codefendant as a witness to which the codefendant objected. During closing argument, defendant's counsel made several comments about the fact his client testified which could be construed as reflecting on the codefendant's failure to do the same. In contrast with other cases this court noted that in that case there were "no direct comments on a defendant's silence," nor did "the attempts to call the defendant to the stand add anything to the comments relied upon." At the time the effort was made to call Roland C. Hansen to the stand the jury heard from Roland C. Hansen only "Your Honor, I object." The trial was a series of objections about one thing or another, and no special significance could be attached to that particular objection. The Fifth Amendment privilege was not identified or mentioned before the jury. What happened did nothing more "than momentarily illuminate the obvious fact that the defendant did not choose to testify." *Id.* at 171.

The remaining issue raised by Roland C. Hansen is related as he objects to a brief comment by government counsel during long closing arguments which he argues is to be construed as a reference to Roland C. Hansen's failure to testify.[6] No objection was made at the time. *United States v. Reicin*, 497 F.2d 563, 572 (7th Cir. 1974), *cert. denied*, 419 U.S. 996. The case against Roland C. Hansen was strong, but not as strong as the case against Steven R. Hansen, as the case against Steven R. Hansen was less circumstantial. Steven R. Hansen was more actively involved in the arson arrangements. That appears to be why the government several times during argument characterized Roland C. Hansen's part in the arson-for-profit scheme as an effort to insulate himself from the others by avoiding the day-to-day activities, dealing with the others through his son, and being guarded in his comments and conversations. Therefore, Roland C. Hansen was labeled as "the man in the shadows," a fair comment based on the evidence. Viewed in the context of the whole case, either by itself or in conjunction with Steven R. Hansen's effort to call Roland C. Hansen to the witness stand four days previously, we believe beyond a reasonable doubt that the comment was harmless error, *Chapman v. California*, 386 U.S. 18 (1967), and within the holding of this court in *Barnes*. The incident could only be lost from thought in the massive evidence of fires and fraud. The jury was instructed at the close of the trial that the burden of proof was on the government; that the defendant had to prove nothing, including his innocence; and that no inference of any kind could be drawn from the failure of defendant to testify. These trial incidents do not rise to the level of "a penalty applied by courts for exercising a constitutional privilege." *Griffin v. California*, 380 U.S. 609, 614 (1965).

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[6] The comment of the government counsel was:

> Now in the few moments that I have left I would indicate to you that what do we have to show that Mr. R. C. Hansen is involved, the man in the shadows, the man who didn't tell about the everyday conversations. We called Chris Caras, Bill Zoesch, and a lot of other people to come in and testify about their conversations, but Mr. R. C. Hansen stayed in the background. Did he have a motive? I suggest to you he did. With these arm's-length transactions between he and his son, I suggest to you that he did.

II.

Steven R. Hansen's Issues

It is urged that the trial judge erred by denying Steven R. Hansen his Sixth Amendment right to confrontation by restricting the examination of witnesses as to bias, motive and interest affecting the credibility of the government's key witnesses. *Davis v. Alaska*, 415 U.S. 308 (1974). If that were so, there would be reversible error, but the right to explore those matters is not without some reasonable limitation within the sound discretion of the trial judge. We find no abuse of discretion. *Alford v. United States*, 282 U.S. 687, 692-94 (1931); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974); *United States v. Allegretti*, 340 F.2d 254 (7th Cir. 1964), *cert. denied*, 390 U.S. 908 (1968).

Steven R. Hansen complains primarily about limitations upon his cross-examination of Bloom. Where to draw the line is not always a matter of precise determination, but the trial court need not in the reasoned exercise of its discretion permit continuous forays and excursions outside of the issues of the case merely because it is argued that the credibility of the witnesses will somehow be affected. In allowing for searching cross-examination the trial judge does not need to go so far as to permit the trial to be converted into a trial of the witness on collateral matters rather than of the defendant on the charge in the indictment. In his final argument the attorney for Steven R. Hansen reminded the jury that he had cross-examined Howard Bloom for ten hours, and that he "would love to spend another ten hours discussing it with the jury." If a ruling by the trial judge here or there amidst the 1300 questions propounded by Steven R. Hansen to Bloom might be considered questionable, those cross-examination rulings cannot in any way be characterized as denying Steven R. Hansen his constitutional right of confrontation. It is not necessary to permit ad infinitum pursuit of some alleged clue of bias, motive and interest to add to an accumulation of similar evidence bearing on the lack of credibility of the witness under attack.

The defense admitted that there was a conspiracy, but claimed that it was between the government and its principal witnesses. Bloom's own father was called and testified that his son could not be believed. In final arguments the attorney for Steven R. Hansen described Bloom as a "flim-flam man," a "con man," a "hustler," a "despicable human being," and the other principal witnesses of the government as convicted felons, thugs and liars. Those extreme accusations are not entirely without support in the record as the unsavory character of the witnesses had been sufficiently established. However, the jury chose to believe the government's witnesses rather than Steven R. Hansen.

Next, Steven R. Hansen objects to the hearsay nature of the testimony of a government witness who testified in his official capacity as a supervisor of the building inspection division of the city about the building code violations records kept under his supervision. His testimony was primarily foundation for the exhibits and an explanation of their contents which noted the deficiencies of the buildings which had been burned. The witness did not claim first-hand knowledge of any specific building code violations. The records were admitted as those kept in the course of regularly conducted activity under Rule 803(6) of the Federal Rules of Evidence. Steven R. Hansen relies on *United States v. American Cyanamid Co.*, 427 F.Supp. 859 (S.D.N.Y. 1977), to the effect that Rule 803(6) is not applicable to government records and that only Rule 803(8) applies.[7] Steven R. Hansen then argues that under Rule 803(8) the records are not admissible as the building inspectors

[7] Rule 803(8) provides:

> (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

were "law enforcement personnel" and thus no exception should be accorded. We need not consider the admissibility of the records under Rule 803(6) as in any event we agree with Steven R. Hansen that Rule 803(8) is applicable, but we disagree with his application of the rule in the circumstances in this case. It was argued to the trial judge by Steven R. Hansen that the enforcement of the building code was a "quasi-criminal" procedure. It appears that failure to comply with the building code may result in a fine, but not in a criminal conviction. We do not believe we are justified in broadening the interpretation of the rules phrase "police officers and other law enforcement personnel" to include city building inspectors. There was ample other unobjectionable first-hand testimony about the poor condition of the burned buildings so as to render the city's records on building conditions only cumulative, and at most harmless error.

The last issue of substance arises because of possible prejudice from the fact that the government in connection with the two perjury counts called as its witness the foreman of the grand jury which had indicted the defendants. That the necessary showing of the materiality of the alleged perjurious statements is an issue for the court and not the jury is of long standing and conceded by the government. *Sinclair v. United States*, 279 U.S. 263, 298 (1929); *United States v. Damato*, 554 F.2d 1371, 1372-73 (5th Cir. 1977); *United States v. Wesson*, 478 F.2d 1180 (7th Cir. 1973); *United States v. Parker*, 244 F.2d 943 (7th Cir. 1957), *cert. denied*, 355 U.S. 836. Not only is materiality primarily a matter of law for the court to determine, but were it otherwise there would be opened the opportunity for prejudicial testimony not otherwise admissible. In this case the matter was compounded by reason of the office the witness held as foreman of the grand jury. The jury was instructed that the foreman's testimony was limited to Steven R. Hansen, and Roland C. Hansen does not raise the issue on appeal.

The government seeks to defend its actions by arguing that the foreman's testimony was relevant for more

reasons than materiality. The government argues that calling the foreman was justified because the foreman also testified that Steven R. Hansen, whom the foreman identified, was placed under oath and because the foreman "placed the defendant's testimony in its proper context." The foreman was asked by the government and permitted over objection to state what the "relevance" was of certain questions propounded to and answers given by Steven R. Hansen before the grand jury. He was further questioned by the government in general terms about the various questions asked Steven R. Hansen and his responses which were claimed to be perjurious. The court and jury should be able to place the defendant's allegedly perjurious testimony in "proper context" without help from the foreman of the grand jury. Among other things the foreman explained the grand jury was looking into the matter of drugs and other statutes which he couldn't recall. Drugs were not involved in this trial. In any event, the government argues, the harm done was due to the prolonged cross-examination of the grand jury foreman by Steven R. Hansen. His cross-examination fully explored the consideration or alleged lack thereof given by the grand jury to the events involved in the perjury counts. What followed during that cross-examination we view as totally inappropriate for petit jury consideration. The government occasionally objected during the cross-examination on the basis that a particular question was beyond the scope of the direct or was immaterial, but otherwise the government sat by while the extensive inquiry was made into how and why the grand jury indicted Steven R. Hansen for perjury. The foreman made a good government witness during both direct and cross-examination provided there need be no concern about a fair trial. That some of the harm resulted from cross-examination is no saving excuse for the government.

Nothing appears in the record to suggest why it was necessary that the matter of materiality be heard by the jury. The grand jury transcript could have been examined by the court to determine materiality as the basis for an instruction on that issue to the jury. If necessary for some reason the grand jury reporter could have been

called to testify about the record on some limited issue. We are always concerned lest a jury consider an indictment to be something more than it is intended to be. The jury is usually fully instructed in that regard, but when the foreman of the grand jury is called without any sufficient reason and in effect justifies the grand jury's actions and the resulting indictment, all precautions about the undue influence of the indictment are very likely for naught. The foreman of the grand jury should not become a champion of the grand jury's indictment and a partner of the government in seeing to the successful prosecution of the case. We consider that the government by calling the foreman without any apparent necessity initiated and then condoned continued prejudicial error. What the government needed to prove to the judge alone could easily have been accomplished without such a prejudicial potential which, if it was not, should have been anticipated. We will not approve what occurred in this case.

Steven R. Hansen also questions the sufficiency of the evidence to establish that he was guilty of perjury. We need not reach that issue in view of our ruling on the prior issue relating to the grand jury foreman.

Steven R. Hansen claims that the trial judge became so biased as to deny him a fair trial. The charge is baseless. It was a long and difficult trial.

Finally, Steven R. Hansen argues that the sentences imposed upon him were based upon improper considerations. As we understand the argument, it is based upon the claim that the trial judge misconceived Steven R. Hansen's role in the arsons because of the alleged curtailment of the examination of witnesses, and also because of his overlooked good rehabilitative possibilities. We see no merit whatsoever in the argument. We see no error in the sentencing procedure. Sentencing is recognized as a matter in the discretion of the trial judge and we will not interfere.

The conviction of Roland C. Hansen is affirmed. The conviction of Steven R. Hansen is affirmed, except as to Counts 24 and 25, the perjury counts, which are reversed and remanded for a new trial.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit